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# Putting the Child First in Custody Battles Between Biological Fathers and Adoptive Parents

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## COMMENTS

### PUTTING THE CHILD FIRST IN CUSTODY BATTLES BETWEEN BIOLOGICAL FATHERS AND ADOPTIVE PARENTS

#### I. INTRODUCTION

In August of 1993, the Illinois Supreme Court enraged the state of Illinois, and much of the nation, when it ruled that the parental rights of the birth father of three year old Richard had been improperly terminated and thereby overturned the child's adoption.<sup>1</sup> During the summer of 1993, the nation witnessed, through the media, the heart wrenching end to a protracted custody battle between the biological and adoptive parents of two and one-half year old Jessica De-Boer.<sup>2</sup> Custody was awarded to the biological parents and the little girl was taken from the only home she had ever known, and "returned" to her biological parents.<sup>3</sup> In San Diego, California, as this comment was written, another custody battle between a biological father and the prospective adoptive parents of two and one-half year old Michael raged, as it had since shortly after the boy was born.<sup>4</sup>

What is going on here? These cases illustrate the tension in the nation's independent adoption laws<sup>5</sup> among the constitutionally protected rights of biological fathers; the tenuous, if not non-existent, rights of adoptive parents; and the little

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1. See discussion *infra* part II.A.1.

2. See, e.g., Nancy Gibbs, *In Whose Best Interest?*, TIME, July 19, 1993, at 44. Jessica's story became a made for TV movie. *Whose Child is This?: The War for Baby Jessica*, (ABC television broadcast, Sept. 26, 1993).

3. See discussion *infra* part II.A.2.

4. See discussion *infra* part II.D.2.

5. An independent adoption, also referred to as a private placement adoption, means "the placement of a child for adoption by the mother or parents themselves or by an intermediary like a lawyer or doctor, rather than by an adoption agency." BLACK'S LAW DICTIONARY 1196 (6th ed. 1990). This comment uses the terminology adopted by the state of California and refers to private placement or private adoptions as independent adoptions. See CAL. FAM. CODE § 8524 (West 1995).

considered, nebulous concept of the "best interests of the child." This comment will explore the relationship in the state of California among independent adoption laws, the rights of biological fathers, and considerations of the best interests of the child, as they are contained in the California Family Code<sup>6</sup> and developed in case law. It will highlight deficiencies in the current law which fail to serve the best interests of the child, while considering the rights of the child's biological father and prospective adoptive parents.

The proposed solutions contained in this comment focus on changes in California independent adoption laws.<sup>7</sup> Many recommendations incorporate the theories and conclusions from psychological studies of a child's attachment to her parent or caregiver (known as attachment theory)<sup>8</sup> and the effect on a developing child of her removal from her primary caregivers during infancy.<sup>9</sup> These proposals strengthen the rights of adoptive parents, define and consider the interests of the child, and preserve the constitutional rights of biological fathers.<sup>10</sup> The solutions within this comment intend to benefit all parties concerned, but especially the adopted child. By clarifying the law in the ways proposed, adoptions will be

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6. In July of 1992, Governor Wilson approved Assembly Bill 2650. Family Code, ch. 162, 1992 Cal. Legis. Serv., No. 6 (West). The new law reorganized the statutes pertaining to child, family and human relations into a single Family Code. This legislation was given a delayed effective date of January 1, 1994. CALIFORNIA COMMITTEE ANALYSIS, SENATE COMMITTEE ON JUDICIARY BILL No. A.B. 2650, June 9, 1992, available in LEXIS, Cal Library, Cacom File. A later bill, Assembly Bill 1500, modified Assembly Bill 2650. Family Law, ch. 219, 1993 Cal. Legis. Serv. No. 6 (West). By creating the Family Code, the legislature sought to alleviate difficulties in understanding and interpreting existing laws that occurred because of the scattered placement of family law throughout many California code sections. The legislature sought to make the law more consistent, to collect it in a more usable format, and to make the statutes more accessible and understandable through their organization in a more logical format. CALIFORNIA COMMITTEE ANALYSIS, SENATE COMMITTEE ON JUDICIARY BILL No. A.B. 2650, June 9, 1992 available in LEXIS, Cal Library, Cacom File.

7. See discussion *infra* part V.

8. Attachment theory involves the study of early relationships between an infant and her primary caregiver. Psychologists consider the formation of this first close and intimate relationship a "fundamental requirement for adequate human development." Eleanor Willemsen, In the Best Interests Of Babies: Attachment Issues in Infant Placement Decisions (unpublished proposal, on file with author, Psychology Department, Santa Clara University). See also discussion *infra* part II.E.1-2.

9. See *infra* text accompanying notes 197-202.

10. See discussion *infra* part V.

facilitated rather than curtailed by the threat of protracted custody battles between biological and adoptive parents.

Part II of this comment examines the separate court decisions which overturned the adoption of Baby Richard and prevented the adoption of Jessica DeBoer, leading in respective removals from the homes of their prospective adoptive parents and permanent placement with their biological parents.<sup>11</sup> Next, it outlines independent adoption law in California, and recent legislative changes.<sup>12</sup> This part then summarizes the California Supreme Court decision which provided additional rights to putative fathers<sup>13</sup> seeking custody in California.<sup>14</sup> It also details the first lower court interpretation of the newly-recognized rights for biological fathers.<sup>15</sup> Finally, part II introduces attachment theory to provide guidance to the courts regarding the impact of removing young children from adoptive homes, often the only homes they have ever known.<sup>16</sup> Part III<sup>17</sup> summarizes and Part IV<sup>18</sup> analyzes the problems presented by the inconsistent and often contradictory judicial decisions and legislative initiatives. Part V proposes solutions to the identified problems.<sup>19</sup>

## II. BACKGROUND

### A. *National Awareness: The "Baby Richard" and "Baby Jessica" Cases*

Only a small number of adoptions are contested, and an even smaller number involve situations where the biological father objects to the adoption.<sup>20</sup> The publicity associated with the overturning of three year old Baby Richard's adoption and the custody battle over two and one-half year old Jessica DeBoer, however, heightened the nation's awareness

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11. See discussion *infra* part II.A.

12. See discussion *infra* part II.C.

13. Putative father means "[t]he alleged or reputed father of a child born out of wedlock." BLACK'S LAW DICTIONARY 1237 (6th ed. 1990). This comment uses the term "biological father" rather than "putative father."

14. See discussion *infra* part II.D.1.

15. See discussion *infra* part II.D.2.

16. See discussion *infra* part II.E.

17. See discussion *infra* part III.

18. See discussion *infra* part IV.

19. See discussion *infra* part V.

20. Carol McHugh, *Experts: Adoption Contests Not Common—But Risks Are*, CHI. DAILY L. BULL., Aug. 30, 1993, at 3.

of what can go wrong during independent adoption proceedings. In these two cases, the increased recognition of the rights of biological fathers added a troublesome issue to independent adoptions.<sup>21</sup> By examining exactly what happened, legally and procedurally, to Baby Richard and Jessica DeBoer, better laws to prevent such tragedies for all concerned can be created and implemented.

### 1. *Baby Richard*

In August of 1993, the Appellate Court of Illinois affirmed the adoption of a two and one-half year old boy, despite the attempt by the birth father to contest the adoption.<sup>22</sup> In June of 1994, the Illinois Supreme Court reversed the appellate court ruling and overturned the final adoption decree of the trial court.<sup>23</sup> Finally, in February 1995, the United States Supreme Court denied the application for a stay of the Illinois Supreme Court's order for the Does "to surrender forthwith" custody of Richard to his biological father.<sup>24</sup>

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21. Until 1972, a birth father not married to the birth mother possessed few, if any, parental rights toward his children. In *Stanley v. Illinois*, 405 U.S. 645 (1972), the Supreme Court held that a putative (or biological) father has a right to gain custody of and care for his children. *Id.* at 658. In *Quilloin v. Walcott*, 434 U.S. 246 (1978), the Court distinguished the rights of fathers who held established relationships with their children from those of fathers who lacked any real relationship with their children. *Id.* at 255-56. More recently, in *Lehr v. Robertson*, 463 U.S. 248 (1983), the Court held that the constitutional rights of an unwed father stemmed from his actual relationship with his child. *Id.* at 261-62. For a detailed discussion regarding the development of the rights of unwed fathers, see generally Elizabeth A. Hadad, Comment, *Tradition and the Liberty Interest: Circumscribing the Rights of the Natural Father*, 56 BROOK. L. REV. 291 (1990); Laurel J. Eveleigh, Comment, *Certainly Not Child's Play: A Serious Game of Hide and Seek With The Rights Of Unwed Fathers*, 40 SYRACUSE L. REV. 1055 (1989); and Daniel C. Zinman, Comment, *Father Knows Best: The Unwed Father's Right to Raise His Infant Surrendered for Adoption*, 60 FORDHAM L. REV. 971 (1992).

22. *In re Doe*, 627 N.E.2d 648, 656 (Ill.), and appeal granted, 624 N.E.2d 807 (Ill. 1993), and *rev'd*, 638 N.E.2d 181 (Ill.), and *reh'g denied* July 12, 1994, and *cert. denied sub nom.* *Baby Richard v. Kirchner*, 115 S. Ct. 499 (1994), and *application denied, stay denied sub nom.* *O'Connell v. Kirchner*, 115 S. Ct. 891, and *stay denied*, 115 S. Ct. 1084 (1995).

23. *In re Doe*, 638 N.E.2d 181, 183 (Ill.), *reh'g denied* July 12, 1994, and *cert. denied sub nom.* *Baby Richard v. Kirchner*, 115 S. Ct. 499 (1994), and *application denied, stay denied sub nom.* *O'Connell v. Kirchner*, 115 S. Ct. 891, and *stay denied*, 115 S. Ct. 1084 (1995).

24. *O'Connell v. Kirchner*, 115 S. Ct. 1084 (1995).

The subject of these cases is Richard,<sup>25</sup> now three years old. Richard's parents were living together when his biological mother became pregnant.<sup>26</sup> Before his birth, however, they had a misunderstanding while his biological father was out of the country.<sup>27</sup> As a result, his birth mother left the apartment she shared with Richard's father and decided to place their child for adoption.<sup>28</sup> When Richard's biological father returned to the United States, he unsuccessfully attempted to reconcile with the child's mother.<sup>29</sup> She did not tell him of her plans for the subsequent adoption of their child.<sup>30</sup> After Richard's birth, she lied to his biological father, telling him the baby had died.<sup>31</sup> Richard's biological father continued his attempts to reconcile with Richard's birth mother, and, not fully believing that Richard had died, made attempts to locate his child.<sup>32</sup> Eventually, Richard's biological parents reconciled, and Richard's biological father began his legal battle to contest his child's adoption.<sup>33</sup>

During Richard's adoption proceeding, the trial court found that the birth father had "failed to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a newborn child during the first 30 [sic] days after the birth."<sup>34</sup>

In upholding Richard's adoption, the appellate court made some very sweeping statements about the best interests of the child. The court began with the premise that Richard, was *not property* belonging to either his natural or adop-

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25. Richard is a fictitious name given to the young boy who is the subject of this lawsuit by the appellate court. *Doe*, 627 N.E.2d at 649 n.1.

26. *Id.*

27. *In re Doe*, 627 N.E.2d 648, 649 n.1. (Ill.), and appeal granted, 624 N.E.2d 807 (Ill. 1993), and *rev'd*, 638 N.E.2d 181 (Ill.), and *reh'g denied* July 12, 1994, and *cert. denied sub nom.* Baby Richard v. Kirchner, 115 S. Ct. 499 (1994), and application denied, stay denied sub nom. O'Connell v. Kirchner, 115 S. Ct. 891, and stay denied, 115 S. Ct. 1084 (1995).

28. *Id.*

29. *Id.* at 650.

30. *Id.*

31. *Id.*

32. *In re Doe*, 627 N.E.2d 648, 649 n.1. (Ill.), and appeal granted, 624 N.E.2d 807 (Ill. 1993), and *rev'd*, 638 N.E.2d 181 (Ill.), and *reh'g denied* July 12, 1994, and *cert. denied sub nom.* Baby Richard v. Kirchner, 115 S. Ct. 499 (1994), and application denied, stay denied sub nom. O'Connell v. Kirchner, 115 S. Ct. 891, and stay denied, 115 S. Ct. 1084 (1995).

33. *Id.* at 650-51.

34. *Id.* at 651.

tive parents.<sup>35</sup> The court affirmatively stated that the child, Richard, was the *real party in interest* so that "the best interest of Richard surface[d] as the paramount issue in the case."<sup>36</sup> Moreover, the court reasoned that the superior right of custody of the child, which belongs to the natural parents, must yield to the best interest of the child.<sup>37</sup> Finally, the court also emphasized the best interest of the child is "not part of an equation" and "is not to be balanced."<sup>38</sup> Rather, "a child's best interest is and must remain inviolate and impregnable from all other factors, including the interests of the parents."<sup>39</sup> Accordingly, the court concluded "that it would be contrary to the best interest of Richard to disturb the judgment of the adoption."<sup>40</sup>

One of the three justices on the panel vehemently dissented, asserting that the biological father had provided a complete affirmative defense to the allegation that he had not met the Illinois statutory standard of "showing a reasonable degree of interest in the child within 30 days after birth."<sup>41</sup> The birth mother lied to him and told him that Richard had died at birth.<sup>42</sup> Moreover, the majority "failed to apply the multi-factor balancing test indigenous to a best interests analysis."<sup>43</sup> Accordingly, the best interest of the child should prevail, "only after a hearing of all evidence relevant to the child's welfare."<sup>44</sup> Given the facts of this case, the dissent stated the majority had reached an erroneous result.<sup>45</sup>

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35. *Id.* at 651-52.

36. *Id.* at 652.

37. *In re Doe*, 627 N.E.2d 648, 652 n.2. (Ill.) (quoting from *Giacopelli v. Florence Crittenton Home*, 158 N.E.2d 613 (Ill. 1959)), and *appeal granted*, 624 N.E.2d 807 (Ill. 1993), and *rev'd*, 638 N.E.2d 181 (Ill.), and *reh'g denied* July 12, 1994, and *cert. denied sub nom.* *Baby Richard v. Kirchner*, 115 S. Ct. 499 (1994), and *application denied, stay denied sub nom.* *O'Connell v. Kirchner*, 115 S. Ct. 891, and *stay denied*, 115 S. Ct. 1084 (1995).

38. *Id.* at 652.

39. *Id.*

40. *Id.* at 654.

41. *Id.* at 658 (Tully, P.J., dissenting).

42. *In re Doe*, 627 N.E.2d 648, 658-59 (Ill.) (Tully, P.J., dissenting), and *appeal granted*, 624 N.E.2d 807 (Ill. 1993), and *rev'd*, 638 N.E.2d 181 (Ill.), and *reh'g denied* July 12, 1994, and *cert. denied sub nom.* *Baby Richard v. Kirchner*, 115 S. Ct. 499 (1994), and *application denied, stay denied sub nom.* *O'Connell v. Kirchner*, 115 S. Ct. 891, and *stay denied*, 115 S. Ct. 1084 (1995).

43. *Id.* at 662 (Tully, P.J., dissenting).

44. *Id.* at 665 (Tully, P.J., dissenting).

45. *Id.* (Tully, P.J., dissenting).

Both the majority and the dissent found fault with the amount of time it took for this case to proceed through the court system. The dissent emphatically asserted that determination of such custody decisions, "should take no more than six months."<sup>46</sup>

The Illinois Supreme Court, however, reversed the ruling outlined above.<sup>47</sup> Justice Heiple delivered the opinion of the court, agreeing somewhat with the trial court's lone dissenter and centering his own analysis around his conclusion that the trial court's finding was not supported by the evidence.<sup>48</sup> According to Heiple's opinion, both the affirming court and the trial court had missed the threshold issue—the improper termination of the parental rights of the biological father.<sup>49</sup> Because the parental rights of the birth father had been improperly terminated by the trial court, the appellate court should not have reached the issue of the child's best interests and, consequently, the appellate decision upholding the adoption should be reversed.<sup>50</sup>

The concurrence, written by Justice McMorrow,<sup>51</sup> elaborated upon the conclusions reached by Justice Heiple. For Justice McMorrow, the appellate decision raised two issues: first, "whether the perceived 'best interests' of the child to remain with his adoptive parents outweighed any consideration of the parental fitness of the [birth father];"<sup>52</sup> and, second, "whether the trial court properly found that [the birth father] was an unfit parent."<sup>53</sup>

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46. *Id.* at 664 (Tully, P.J., dissenting).

47. In this plurality opinion, three of the four justices sided with the concurrence authored by Justice McMorrow which presented a more comprehensive discussion of their reasoning for reversing the ruling of the lower court. *In re Doe*, 638 N.E.2d 181 (Ill.), and *reh'g denied* July 12, 1994, and *cert. denied sub nom.* *Baby Richard v. Kirchner*, 115 S. Ct. 499 (1994), and *application denied, stay denied sub nom.* *O'Connell v. Kirchner*, 115 S. Ct. 891, and *stay denied*, 115 S. Ct. 1084 (1995).

48. *Id.* at 182.

49. *Id.*

50. *Id.*

51. Justices Miller and Freeman joined Justice McMorrow in his concurrence. *Id.* at 187.

52. *In re Doe*, 638 N.E.2d 181, 183 (Ill.) (McMorrow, J., concurring), and *reh'g denied* July 12, 1994, and *cert. denied sub nom.* *Baby Richard v. Kirchner*, 115 S. Ct. 499 (1994), and *application denied, stay denied sub nom.* *O'Connell v. Kirchner*, 115 S. Ct. 891, and *stay denied*, 115 S. Ct. 1084 (1995).

53. *Id.* (McMorrow, J., concurring).



At the time of Richard's adoption, the adoption laws of Illinois required that the birth parent who withholds consent to the adoption must be found *unfit* before his or her parental rights may be terminated.<sup>54</sup> Unfitness must also be determined before the court may proceed to evaluate the best interests of the child.<sup>55</sup> The concurrence stated that the appellate court had been influenced by the time which had elapsed since the placement of the child with the adoptive parents, overriding this requirement of the Illinois Adoption Act.<sup>56</sup> As to the second issue, the concurrence determined that the birth father had not been proven to be an unfit parent.<sup>57</sup> The permanent nature of termination of parental rights mandates that unfitness be proven by clear and convincing evidence.<sup>58</sup> Given the facts of the case, and particularly because the birth mother repeatedly hindered and frustrated any attempts by the birth father to locate his child, the court found the evidence did not support a finding that the father had failed to demonstrate sufficient interest in the child.<sup>59</sup>

The decision unleashed much public outcry, and the Governor of Illinois responded by calling for legislative action.<sup>60</sup> The Illinois legislature subsequently changed the Illinois Adoption Act in order to prevent the same result from occurring again.<sup>61</sup> This change in the law, however, did not affect

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54. *Id.* (McMorrow, J., concurring) (citing Illinois' Adoption Act, Ill. Ann. Stat. ch. 750, para. 50, 8(a)(1) (Smith-Hurd 1993)).

55. *Id.* at 184 (McMorrow, J., concurring) (referencing *In re Adoption of Syck*, 562 N.E.2d 174 (Ill. 1990)).

56. *Id.* at 185 (McMorrow, J., concurring).

57. *In re Doe*, 638 N.E.2d 181, 187 (Ill.) (McMorrow, J., concurring), and *reh'g denied* July 12, 1994, and *cert. denied sub nom.* *Baby Richard v. Kirchner*, 115 S. Ct. 499 (1994), and *application denied, stay denied sub nom.* *O'Connell v. Kirchner*, 115 S. Ct. 891, and *stay denied*, 115 S. Ct. 1084 (1995). Illinois law defines an unfit parent to include a parent who has "fail[ed] to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a new born child during the first 30 days after its birth." *Id.* at 186 (McMorrow, J., concurring) (quoting the Illinois' Adoption Act, Ill. Ann. Stat. ch. 750, para. 50, 1(D)(1) (Smith-Hurd 1993)).

58. *Id.* at 186 (McMorrow, J., concurring) (citations omitted).

59. *Id.* at 187 (McMorrow, J., concurring).

60. *Edgar Calls for Special Session on Baby Richard Legislation*, CHI. DAILY L. BULL., July 1, 1994, at 1.

61. Public Act 88-550, among other changes, modified the Illinois Adoption Act. See generally *Family Law—Uniform Interstate Family Support Act*, Public Act 88-550, 1994 Ill. Legis. Serv. No. 3, 381 (West). The most pertinent changes include: (1) establishing a biological father registry and (2) increasing the rights of adoptive parents by allowing them to request custody even if the

the outcome for Richard. The United States Supreme Court denied the applications for stay.<sup>62</sup> Justice O'Connor would have granted the stay, however, and in her dissent voiced her concern that the rationale of the Illinois Supreme Court's order requiring the Does to return Richard forthwith was unclear and that the changes to Illinois adoption laws might be unconstitutional.<sup>63</sup>

## 2. *Baby Jessica*

Jessica's birth mother decided to give her baby girl up for adoption.<sup>64</sup> She named "Scott" as the father, and Scott also signed a release of parental rights.<sup>65</sup> After a termination hearing, for which both Jessica's birth mother and Scott signed waivers of notice, custody of Jessica went to her prospective adoptive parents.<sup>66</sup>

Two legal actions to reclaim Jessica were then initiated. Nine days after the prospective adoptive parents filed their adoption petition,<sup>67</sup> the birth mother attempted to have the termination set aside by asserting that her release of parental rights was defective.<sup>68</sup> In addition, she asserted that "Daniel," not Scott, was Jessica's true biological father.<sup>69</sup> At

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adoption remains invalid. The law requires that the reviewing court first consider the best interests of the child in making its custody decision. *Id.*

62. *O'Connell v. Kirchner*, 115 S. Ct. 1084 (1995).

63. *Id.* (O'Connor, J., dissenting).

64. *Ex rel. B.G.C.*, 496 N.W.2d 239, 240 (Iowa 1992), *aff'd sub nom. In re Clausen*, 502 N.W.2d 649 (Mich.), and *stay denied sub nom. DeBoer v. DeBoer*, 114 S. Ct. 1, and *stay denied*, 114 S. Ct. 11 (1993). Jessica's biological mother gave birth to Jessica on February 8, 1991. *Id.* She signed a release of custody form relinquishing her parental rights two days later on February 10, 1993. *In re Clausen*, 502 N.W.2d 649, 652 (Mich.), *stay denied sub nom. DeBoer v. DeBoer*, 114 S. Ct. 1, and *stay denied*, 114 S. Ct. 11 (1993).

65. *B.G.C.*, 496 N.W.2d at 241.

66. *Id.* The court did not disclose the date of the hearing. It merely stated that a hearing was held. *Id.*

67. *Clausen*, 502 N.W.2d at 651, 652. The prospective adoptive parents filed their petition for adoption in Iowa on February 25, 1991. *Id.* at 652. The birth mother filed a motion to revoke her release of custody on March 6, 1991. *Id.*

68. *B.G.C.*, 496 N.W.2d at 241. In her motion, the birth mother alleged that the release was obtained through fraud, coercion, and misrepresentation of material fact. *Id.* She also alleged that because the full 72-hour waiting period between the birth and the release of custody had not passed she had good cause for revocation. *Id.* She signed the release approximately 40 hours after Jessica was born. *Id.* at 243.

69. *Ex rel. B.G.C.*, 496 N.W.2d 239, 243 (Iowa 1992), *aff'd sub nom. In re Clausen*, 502 N.W.2d 649 (Mich.), and *stay denied sub nom. DeBoer v. DeBoer*,

the same time, a second legal proceeding materialized when Daniel, Jessica's biological father, decided to assert his paternity, and to contest the adoption in district court.<sup>70</sup> After he proved that he was Jessica's father, the court awarded custody of Jessica to him.<sup>71</sup> Before Daniel could take custody, however, the prospective adoptive parents appealed and obtained a stay of the district court's order transferring custody.<sup>72</sup> The two cases (the birth mother's set aside motion, and the birth father's paternity action) were consolidated in the Iowa Supreme Court.<sup>73</sup>

Under Iowa law, as interpreted by the Iowa Supreme Court, "parental rights may not be terminated solely on consideration of the child's best interest," but rather "specific grounds for termination under [the statute] must also be established."<sup>74</sup> Here, because the biological father's parental rights had not been terminated, the adoption was adjudged fatally flawed.<sup>75</sup> Because the man asserting himself as Jessica's biological father met the required showing for paternity,<sup>76</sup> and he had not abandoned Jessica,<sup>77</sup> the Supreme

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114 S. Ct. 1, and stay denied, 114 S. Ct. 11 (1993). The birth mother's motion in juvenile court to set aside the termination of her parental rights failed and she appealed. *Id.* On appeal, the court reversed its termination of her parental rights and remanded to the juvenile court for further proceedings. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 241.

74. *Ex rel.* B.G.C., 496 N.W.2d 239, 245 (Iowa 1992), *aff'd sub nom.* In re Clausen, 502 N.W.2d 649 (Mich.), and stay denied *sub nom.* DeBoer v. DeBoer, 114 S. Ct. 1, and stay denied, 114 S. Ct. 11 (1993). The Iowa Code section 600.3(2) states "the court may not consider whether the adoption will be for welfare and the best interests of the child where the parents have not consented to an adoption . . . ." *Id.*

75. *Id.*

76. While the birth mother named another man, "Scott" as the father, blood tests "showed a 99.99% probability that 'Daniel' was the father and a 0% chance that 'Scott' was the father." *Id.* at 246. This, in conjunction with the birth mother's affidavit naming "Daniel", met Iowa's preponderance of the evidence standard for paternity. *Id.*

77. According to Iowa law, abandonment is one of the grounds for termination of parental rights. *Id.* Iowa Code section 600A.2(16) defines abandonment "as the relinquishment or surrendering of parental rights and includes both the intention to abandon and the acts by which the intention is evidenced." *Id.* The burden for a showing of abandonment is "clear and convincing proof." *Id.* The majority concluded that the biological father's actions did not suggest that he intended to abandon the baby, but rather that he "did everything he could reasonably do to assert his parental rights, beginning even before he actually knew that he was the father." *Id.* The facts the court considered relevant were the

Court affirmed the order of the lower court: the parental rights of Jessica's biological father had not been properly terminated and the adoption was dismissed.<sup>78</sup>

In his dissent, Iowa Supreme Court Justice Snell disagreed with the majority's conclusion on the issue of whether sufficient evidence existed to show abandonment. Rather than beginning his analysis at the time when Jessica's biological mother told her biological father that he might be the baby's father, Justice Snell began his analysis in December of 1990, at the time when Jessica's biological father knew that her biological mother was pregnant.<sup>79</sup> Given that the child was born in February, Justice Snell reasoned that her biological father had "knowledge of the facts that support the likelihood that he was the biological father" in December and yet "did nothing to protect his rights."<sup>80</sup> Consequently, Justice Snell would have remanded for termination of the biological father's parental rights based on abandonment, denied the birth mother's motions, and allowed the adoption to proceed.<sup>81</sup> Justice Snell found that "[t]he specter of newly named genetic fathers, upsetting adoptions, perhaps years later, [was] an unconscionable result."<sup>82</sup>

After losing in Iowa, the prospective adoptive parents turned to the courts in their home state of Michigan. The Michigan Supreme Court, in a per curiam decision, held that federal law required Michigan to honor the Iowa court decision, regardless of the fact that Jessica's best interests had not been considered.<sup>83</sup>

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biological father's meeting with the attorney 10 days after the birth mother informed him he might be the father. He drove a truck and was out of town on a road trip during the interim. While he did not yet know the results of the blood tests, he filed a request to vacate the termination order, and a petition to intervene in the adoption. He made these filings one month after he learned he might be Jessica's father. *Id.*

78. *Id.*

79. *Ex rel. B.G.C.*, 496 N.W.2d 239, 247 (Iowa 1992), *aff'd sub nom. In re Clausen*, 502 N.W.2d 649 (Mich.), and *stay denied sub nom. DeBoer v. DeBoer*, 114 S. Ct. 1, and *stay denied*, 114 S. Ct. 11 (1993).

80. *Id.*

81. *Id.*

82. *Id.*

83. See *In re Clausen*, 502 N.W.2d 649 (Mich.), *stay denied sub nom. DeBoer v. DeBoer*, 114 S. Ct. 1, and *stay denied*, 114 S. Ct. 1 (1993). The Michigan Supreme Court reasoned that the Uniform Child Custody Jurisdiction Act [hereinafter UCCJA] and the federal Parental Kidnapping Prevention Act [hereinafter PKPA] deprived Michigan courts of jurisdiction over the matter

Then, Jessica, through her next friend,<sup>84</sup> requested that the United States Supreme Court stay the decision of the Michigan court pending Supreme Court review.<sup>85</sup> Justice Stevens denied the application for a stay.<sup>86</sup> Justice Blackmun, however, wrote a dissent with which Justice O'Connor joined.<sup>87</sup> Justice Blackmun found himself unwilling to wash his hands of the case.<sup>88</sup> Two factors influenced him. First, the decision placed Jessica's personal well-being at risk.<sup>89</sup> Second, a unanimous New Jersey decision supported the prospective adoptive parents' argument.<sup>90</sup> Accordingly, he reasoned that the fundamental disagreement between the New Jersey and Michigan courts "over the duty and authority of state courts to consider the best interests of a child" warranted a closer look by the Court.<sup>91</sup>

Her legal avenues exhausted, Jessica DeBoer was removed from the only home she had ever known to be "returned" to her biological parents.<sup>92</sup>

### B. *Uniform Adoption Act*

An attempt to address weaknesses in and disparities between state adoption laws has been made at the national level with the drafting of a new Uniform Adoption Act.<sup>93</sup> Only five states ratified the 1969 revision of the current Uni-

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and mandated enforcement of the Iowa Supreme Court decision. *Id.* at 652. Moreover, the prospective adoptive parents lacked standing because legally they constituted third parties in relation to Jessica. *Id.*

84. "Next friend" means one acting for the benefit of an infant, or other person who is unable to look after his or her own interests or manage his or her own lawsuits, without being appointed as a guardian. BLACK'S LAW DICTIONARY 1043 (6th ed. 1990).

85. *DeBoer v. DeBoer*, 114 S. Ct. 1, *stay denied*, 114 S. Ct. 11 (1993).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *DeBoer v. DeBoer*, 114 S. Ct. 1, *stay denied* 114 S. Ct. 11 (1993). The prospective adoptive parents argued that federal law authorized the Michigan court to modify the custody decree issued in Iowa because the Iowa courts did not consider Jessica's best interests. *Id.*; see *E.E.B. v. D.A.*, 446 A.2d 871 (N.J. 1982).

91. *DeBoer*, 114 S. Ct. 1.

92. *Sobbing Toddler Returned to Her Biological Parents*, L.A. TIMES, Aug. 3, 1993, at A10.

93. Susan Chira, *Law Proposed to End Adoption Horror Stories*, N.Y. TIMES, Aug. 24, 1994, at A12.

form Adoption Act.<sup>94</sup> The new Uniform Adoption Act would limit the time frame during which a biological father may stop the adoption of his child.<sup>95</sup> The court handling the adoption would be required to notify the birth father of the impending adoption.<sup>96</sup> Upon notification, the birth father would then have thirty days to respond.<sup>97</sup> The uniform law also would require counseling for the birth parents and would shorten the time frame in which they can change their minds after giving up a child for adoption to only eight days.<sup>98</sup> In addition, it would require consideration of the best interests of the child, as well as the rights of the biological and adoptive parents, in situations where a birth father did not know of the birth and later sought custody.<sup>99</sup>

### C. California Adoption Law

Reacting in part to what happened in Iowa and Michigan to Jessica DeBoer, the California legislature proposed and enacted changes to California's adoption laws. None of these legislative changes, however, directly addressed the issue of biological fathers who seek to assert their parental rights upon finding out about their children months, or even years, after adoption proceedings have begun or have been completed.

There are two types of adoptions in California: agency adoptions and independent adoptions.<sup>100</sup> In an agency adoption, the birth parent *relinquishes* the child to a licensed

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94. UNIF. ADOPTION ACT, 9 U.L.A. 1 (Supp. 1991). The states which have adopted the 1969 Revised Uniform Adoption Act are Alaska, Arkansas, Montana, North Dakota and Ohio. *Id.* Oklahoma has adopted the original 1953 version of the Act. *Id.*

95. Chira, *supra* note 93, at A7. Joan Hollinger, a law professor at the University of California at Berkeley, Boalt Hall, drafted the new Act. *Id.*

96. *Id.*

97. *Id.* The father would have to demonstrate his fitness as a parent and the court would be authorized to examine his "parental record" as to his dealings with any other children he had previously fathered. *Id.*

98. *Id.*

99. *Id.*

100. Division 13 of the Family Code contains the laws pertaining to adoption in the state of California. According to the Family Code, "[a]gency adoption' means the adoption of a minor, . . . in which the department or a licensed adoption agency is a party to, or joins in, the adoption petition." CAL. FAM. CODE § 8506 (West 1995). An independent adoption is "the adoption of a child in which neither the department nor an agency licensed by the department is a party to, or joins in, the adoption petition." *Id.* § 8524.

adoption agency or Department of Social Services.<sup>101</sup> Relinquishment of the child, by either birth parent, terminates all parental rights and responsibilities toward the child.<sup>102</sup> In an independent adoption, however, the child is not relinquished to anyone. Rather, the birth parent *consents* to the adoption of the child by the prospective adoptive parents.<sup>103</sup> Consent may be withdrawn with court approval.<sup>104</sup> Consent to placement and subsequent adoption differs from relinquishment; termination of parental rights of the birth parent(s) comprises a separate step in the process.<sup>105</sup>

Another fundamental difference between the two types of adoptions is that the birth parent chooses the prospective adoptive parents in an independent adoption,<sup>106</sup> whereas, in an agency adoption, the agency is responsible for placement of the child with adoptive parents.<sup>107</sup>

This statutory scheme also divides birth parents into three categories: birth mothers, presumed fathers, and natural fathers. If the child's father falls within the statutory rubric of a presumed father, consent must be obtained from both parents in order for a child to be adopted through an independent adoption.<sup>108</sup> However, if the child's father is not a presumed father, i.e. a natural father, then the statute requires only the consent of the child's mother for the adoption to be effective.<sup>109</sup>

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101. *See id.* § 8700(a).

102. *Id.* § 8700(e).

103. *See id.* § 8814.

104. *Id.* § 8815(a).

105. *Id.* § 8819. Sections 7660 through 7666 provide for the termination of birth parents rights and proper notification. *See generally id.* §§ 7660-7666.

106. *See id.* § 8801.

107. *Id.* § 8704. *See also id.* §§ 8708-8710 (placement preferences in agency adoptions).

108. *Id.* § 8604. This comment is only concerned with one of the means by which a man can become a presumed father found in Family Code section 7611(d) which states that a man is a presumed father if "[h]e receives the child into his home and openly holds out the child as his natural child." *Id.* § 7611(d). Other means to establish the presumption include showing that the man and the natural mother "are or have been married" or, if he and the natural mother "attempted to marry each other," that the child's birth occurred during the attempted marriage or within 300 days of its termination if it ended. *Id.* § 7611(a)-(b). After the birth of the child, if the couple married or attempted to marry, the presumption can be shown by the name on the birth certificate, obligation to support the child, or receipt of the child into the man's home and holding the child out as his own. *Id.* § 7611(c)-(d).

109. *Id.* § 8605.

Currently in California, if the natural father wants to stop an adoption, the court first determines whether he is the father, and then ascertains whether the retention of his parental rights serves the best interests of his child.<sup>110</sup> If consent is withdrawn, the court must approve the adoption based upon an analysis of the child's best interests.<sup>111</sup>

### 1. *Counseling for Placing Birth Parents*

Senator Bergeson authored legislation which made significant changes to the independent adoption laws.<sup>112</sup> These changes were in response to the tragedy surrounding Jessica DeBoer. Preventing situations like Jessica's from occurring in California became a legislative goal.<sup>113</sup> Consequently, section 8801.5, operative January 1, 1995, was added to the Family Code. This new section provides that the adoption service provider<sup>114</sup> shall advise each birth parent *placing* a child for adoption of their rights.<sup>115</sup> These rights include: advisement of the alternatives to adoption and alternative types of adoption, separate legal counsel paid for by the prospective adoptive parents, and a minimum of three separate counseling sessions which must each be held on different days and last at least fifty minutes.<sup>116</sup>

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110. *Id.* § 7664(b) (replacing CAL. CIV. CODE § 7017(d)(2)).

111. *Id.* § 8815(a), (d). The factors to be balanced in an analysis by the court include, but are not limited to: an assessment of the child's age, the extent of bonding with the prospective adoptive parent or parents, the extent of bonding or the potential to bond with the birth parent or parents, and the ability of the birth parent or parents to provide adequate and proper care and guidance to the child. *Id.* § 8815(d). This version of the section remains in effect until January 1, 1995. After that date, consent becomes irrevocable if withdrawn after 120 days. *Id.* § 8814.5(b). Prior to 120 days, if the birth parent requests return of the child, the child must be immediately returned. *Id.* § 8815(b).

112. Senator Bergeson authored Senate Bill 1148, Chapter 1353. Family Law—Independent Adoptions, ch. 1353, 1992 Cal. Legis. Serv., No. 12 (West). This bill was later modified by Senate Bill 792, Chapter 758. Family Law—Adoption—Independent, ch. 758, 1993 Cal. Legis. Serv., No. 9 (West).

113. CALIFORNIA COMMITTEE ANALYSIS, ASSEMBLY COMMITTEE ON JUDICIARY BILL No. S.B. 792, Aug. 18, 1993 available in LEXIS, Cal Library, Cacom File.

114. An adoption service provider can be either a licensed private adoption agency or a licensed clinical social worker with a minimum of five years' experience with either a licensed adoption agency or the Department of Social Services. CAL. FAM. CODE § 8502(a)-(b) (West 1995). Outside of California, an adoption service provider can be either a licensed adoption agency or a certified clinical social worker under the laws of that state. *Id.* § 8502(c).

115. *Id.* § 8801.5(a).

116. *Id.* § 8801.5(c),(d).



## 2. 120 Day Limit on Revocable Consent

The most significant change imposed by the previously mentioned legislation also took effect on January 1, 1995.<sup>117</sup> The new law gives the placing birth parent 120 days in which to take action if that parent wants the child back: if the parent takes no action, consent becomes irrevocable and permanent on the 121st day after it is signed.<sup>118</sup> The law concerning withdrawal of consent also changed.<sup>119</sup> Court approval of the withdrawal is no longer required. Instead, once 120 days have passed, the consent becomes irrevocable and the birth parent cannot withdraw his or her consent.<sup>120</sup> The birth parent, however, may request the return of the child at any time before the 120 day period expires. Upon such a request, the statute mandates that the prospective adoptive parent immediately return the child to the birth parent.<sup>121</sup> For prospective adoptive parents who harbor concerns that the birth parent requesting the child's return may be unfit or presents a danger to the child, reporting their concerns is their only recourse.<sup>122</sup> They cannot use such fears as a basis for not returning the child.<sup>123</sup>

## 3. New Type of Adoption: Identified Adoption

In September of 1992, Governor Wilson approved an assembly bill which created a new form of agency adoption, called an identified adoption.<sup>124</sup> In an identified adoption, the birth parent relinquishes the child to the agency or Department of Social Services,<sup>125</sup> as in an agency adoption.

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117. Family Law—Adoption—Independent, ch. 758, 1993 Cal. Legis. Serv., No. 9, Leg. Counsel's Dig. 3426, 3427 (West).

118. See CAL. FAM. CODE § 8814.5(b) (West 1995).

119. *Id.* §§ 8814.5, 8815.

120. *Id.* § 8815(a) (operative Jan. 1, 1995).

121. *Id.* § 8815(b).

122. *Id.* § 8815(c). The prospective adoptive parents may "report their concerns to the investigating adoption agency and the appropriate child welfare agency." *Id.*

123. *Id.*

124. See Family Law—Adoption—Relinquishment of Parental Rights, ch. 667, 1992 Cal. Legis. Serv., No. 9 (West). See also CALIFORNIA COMMITTEE ANALYSIS, ASSEMBLY COMMITTEE ON JUDICIARY BILL NO. A.B. 3456, Apr. 8, 1992 available in LEXIS, Cal Library, Cacom File.

125. Family Law—Adoption—Relinquishment of Parental Rights, ch. 667, 1992 Cal. Legis. Serv. No. 9, § 1, 2580, 2509 (West) (amendment to Cal. Civ. Code § 222.10(b), now Cal. Fam. Code § 8700(a)).

However, the birth parent then chooses the prospective adoptive parents,<sup>126</sup> similar to an independent adoption.

#### D. *Rights of Biological Fathers in California*

##### 1. *Adoption of Kelsey S.*

The California Supreme Court, in *Adoption of Kelsey S.*,<sup>127</sup> clearly established that a biological father possesses a constitutional right to contest an adoption and gain custody of his child.<sup>128</sup> The court held that the statutory distinction in California between "natural" fathers, "presumed" fathers, and birth mothers,<sup>129</sup> to the extent that the statutes allow a mother unilaterally to preclude the biological father from meeting the statutory requirements and "becoming" a presumed father, violated the principle of equal protection and due process guaranteed biological fathers by the federal constitution.<sup>130</sup> This statutory construct allows the state to terminate the parental rights of the biological father upon a showing that it is in the child's best interest. As part of this holding, the court stated that "[i]f an unwed father promptly comes forward and demonstrates a full commitment to his parental responsibilities—emotional, financial, and otherwise—his federal constitutional right to due process prohibits the termination of his parental relationship *absent* a showing of his unfitness as a parent."<sup>131</sup>

In *Kelsey S.*, the prospective adoptive parents filed a petition for adoption alleging that California law required only the consent of the birth mother to the adoption because the birth father qualified as a natural father as opposed to a pre-

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126. *Id.*

127. 823 P.2d 1216 (Cal. 1992). The facts leading up to the placement of Kelsey S. for adoption are straightforward. The birth mother gave birth to a boy, Kelsey, in May of 1988. *Id.* at 1217. Kelsey's biological father was married to another woman, and his birth mother intended to give Kelsey up for adoption. *Id.* However, the birth father objected because he wanted to raise the child. *Id.* Two days after Kelsey was born, his biological father filed an action under Civil Code section 7006 (now California Family Code section 7630) to establish his parental relationship and obtain custody. *Id.* at 1217-18. As a result, the court issued an order that temporarily awarded custody to the biological father and stayed all adoption proceedings. *Id.* at 1218. However, by this time the baby was already in the custody of the prospective adoptive parents. *Id.*

128. *Id.* at 1236.

129. See generally CAL. FAM. CODE §§ 7611, 7612, 7614 (West 1995).

130. *Kelsey S.*, 823 P.2d at 1236.

131. *Id.* (emphasis added).

sumed father.<sup>132</sup> Accordingly, state law required the trial court to determine whether Kelsey's best interests were better served by the birth father's retention of his parental rights or by allowing the adoption to proceed.<sup>133</sup> The trial court "found 'by a bare preponderance' of the evidence that the child's best interest required termination of [the biological father's] parental rights."<sup>134</sup> The court of appeal affirmed the judgment.<sup>135</sup>

In explaining its decision, the California Supreme Court discussed in detail the statutory framework in California which creates three different classifications of parents: mothers, biological fathers who are presumed fathers, and biological fathers who are *not* presumed fathers, but rather, natural fathers.<sup>136</sup> This statutory construct, treats the *natural* father differently from either mothers or presumed fathers; his consent to adoption is *not* required unless he shows that retaining his parental rights serves the best interests of

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132. Adoption of Kelsey S., 823 P.2d 1216, 1237 (Cal. 1992). The court relied on Civil Code section 7006(a), now Family Code section 7630, which states that the child, the child's birth mother or the child's presumed father, according to section 7611 subdivision (a), (b), or (c) may bring an action to determine the existence of nonexistence of a father child relationship. CAL. FAM. CODE § 7630(a) (West 1995). Section 7611 sets forth the requirements for status as a presumed father. See *id.* § 7611.

133. The court relied on the best interest analysis in Civil Code section 7017(d)(2). *Kelsey S.*, 823 P.2d at 1219. Civil Code section 7017(d)(2) is now Family Code section 7664 and states:

If the natural father or a man representing himself to be the natural father claims parental rights, the court shall determine if he is the father. The court shall then determine if it is in the best interest of the child that the father retain his parental rights, or that an adoption of the child be allowed to proceed. The court, in making that determination, may consider all relevant evidence, including the efforts made by the father to obtain custody, the age and prior placement of the child, and the effects of a change of placement on the child. If the court finds that it is in the best interest of the child that the father should be allowed to retain his parental rights, it shall order that his consent is necessary for an adoption. If the court finds that the man claiming parental rights is not the father, or that if he is the father it is in the child's best interest that an adoption be allowed to proceed, it shall order that person's consent is not required for an adoption. The finding terminates all parental rights and responsibilities with respect to the child.

CAL. FAM. CODE § 7664(b) (West 1995).

134. *Kelsey S.*, 823 P.2d at 1218 (emphasis in original). The appellate court does not elaborate as to what evidence proved decisive at the trial level. *Id.*

135. *Id.*

136. *Id.* at 1219 (emphasis in original).

his child.<sup>137</sup> The consent of the mother and the *presumed* father, however, are always required, regardless of the best interests of the child.<sup>138</sup>

The court dismissed the birth father's argument that constructive receipt of the child established him as a presumed father under the statute,<sup>139</sup> and directly addressed the constitutional validity of a statute which allows a child's mother to unilaterally preclude the biological father from obtaining the legal right to withhold his consent to his child's adoption.<sup>140</sup>

While the precise question presented by *Kelsey S.* had never before come before the United States Supreme Court, the Court has handed down a number of decisions pertaining to the rights of unwed fathers.<sup>141</sup> As part of its discussion, the California Supreme Court looked to these Court decisions,<sup>142</sup> as well as treatment of the rights of biological father

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137. *Adoption of Kelsey S.*, 823 P.2d 1216, 1219 (Cal. 1992).

138. *Id.*

139. *Id.* at 1220-22.

140. *Id.* at 1223.

141. The line of Supreme Court cases begins with *Stanley v. Illinois*, 405 U.S. 645 (1972), which held that a biological father has a right to gain custody of and care for his children. *Id.* at 648. Next, *Quilloin v. Walcott*, 434 U.S. 246 (1978), limited the holding in *Stanley* by holding that a biological father's due process rights were not violated where he failed to legitimate his child, had never lived with nor had a custodial relationship with his child, and had failed to provide support for his child on a regular basis. *Id.* at 255. Subsequently, *Caban v. Mohammed*, 441 U.S. 380 (1979) held that a state statute which allowed an unwed mother, but not an unwed father, to block the adoption of an illegitimate child violated equal protection where the biological father had substantially participated in the care and custody of his children. *Id.* at 394. Finally, *Lehr v. Robertson*, 463 U.S. 248 (1983), held that the mere existence of a biological link does not merit the same protections under the Due Process Clause as does a demonstration of commitment to parental responsibilities, and that the Equal Protection Clause is not violated where the biological father never established a relationship with his child. *Id.* at 261. *See also supra* note 21.

142. From the first three decisions the court distilled the following rules: (1) a court may not terminate the parental rights of a biological father absent a showing of his unfitness as a parent; and (2) the best interests of the child, alone, would be an insufficient basis for termination of the parental rights of a biological father. *See Adoption of Kelsey S.*, 823 P.2d 1216, 1223-26 (Cal. 1992). From *Lehr*, the court elicited the factor that a biological father could demonstrate his commitment to his parental responsibilities by making "a reasonable and meaningful attempt" at establishing a relationship with his child. *Id.* at 1228.

by the courts of other states,<sup>143</sup> the California Supreme Court,<sup>144</sup> and California appellate court decisions<sup>145</sup> in great detail in order to establish the principles for its own decision.

Guided by these decisions, the *Kelsey S.* court concluded that "[a]bsent a showing of a father's unfitness, his child is ill-served by allowing its mother effectively to preclude the child from ever having a meaningful relationship with its only other biological parent."<sup>146</sup> After explaining its holding,<sup>147</sup>

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143. From New York high court decision, *In re Raquel Marie X.*, 559 N.E.2d 418 (N.Y. 1990), *cert. denied sub nom. Robert C. v. Miguel T.*, 498 U.S. 984 (1990), the court found more support for the principal that obtaining a protected parental interest requires more than a biological connection. *Kelsey S.*, 823 P.2d at 1229. The biological father must not only be the father, he must behave like one by promptly doing everything he can to show his willingness and ability to begin and maintain the fullest possible relationship with his child. *Id.* This enables a court to examine the actions of the biological father and avoid making the "father's rights contingent on the mother's wishes." *Id.*

144. The California Supreme Court, in an earlier case, invalidated a trial court termination of a natural father's parental rights using a best interests of the child standard without determining whether granting custody to the birth father would be detrimental to the child. *Kelsey S.*, 823 P.2d at 1230. While the basis of the decision was statutory, the court suggested that federal constitutional law required parental preference. *Id.* at 1230. In *Kelsey S.*, the court summarized its reasoning in *Baby Girl M.* as follows:

The linchpin of our decision in *Baby Girl M.* was statutory rather than constitutional. Section 7017, subdivision (d), . . . set forth the procedure for terminating a natural father's rights before granting an adoption petition. Section 7017, however, did not specify what standard should be used in determining whether to terminate the father's rights. Based on the legislative history of section 7017 and prior decision of this court, we concluded that section 4600 applied to a section 7017 custody hearing. Section 4600 states that before awarding custody to a non-parent a court must find that an award of custody to a parent would be detrimental to the child and the award to a non parent is required to serve the best interests of the child.

*Id.* (citations omitted).

145. The court discussed *Adoption of Marie R.*, 145 Cal. Rptr. 122 (1978) (holding a mother may prevent a natural father from acquiring presumed father status), *W.E.J. v. Super. Ct.*, 160 Cal. Rptr. 862 (1979) (holding a natural father was not entitled to custody for the purpose of becoming a presumed father), and *Jermstad v. McNelis*, 258 Cal. Rptr. 519 (1989) (holding that section 7017 of the Uniform Parentage Act required the biological father to be given parental preference where he promptly acknowledges his paternity and seeks custody of his child). *Kelsey S.*, 823 P.2d at 1230-31.

146. *Id.* at 1236.

147. The court characterized the issue before it as whether California's statutory distinction between biological mothers and fathers served "important governmental objectives and [was] substantially related to achievement of those objectives." *Adoption of Kelsey S.*, 823 P.2d 1216, 1233 (Cal. 1992) (alteration in original) (quoting from *Caban v. Mohammed*, 441 U.S. 380, 388 (1979)). As part of its rationale, the court emphasized the state's objective as "providing for

the court elaborated with factors it deemed pertinent to a determination of the biological father's commitment. These factors included consideration of the father's conduct both *before* and *after* the child's birth.<sup>148</sup> As soon as the father "knows or reasonably should know"<sup>149</sup> the birth mother is pregnant, he should immediately attempt to assume his parental responsibilities as fully as the birth mother will allow and his circumstances permit.<sup>150</sup> The father must also demonstrate his personal willingness to assume full custody of his child himself and not merely his desire to block a planned adoption.<sup>151</sup> Other factors include public acknowledgment of paternity by the biological father, payment of as much of the pregnancy and birth expenses as his financial situation will allow and initiating prompt legal action to seek custody of his child.<sup>152</sup>

The court qualified its decision as applying only in the narrow set of circumstances where an unwed biological father has demonstrated a "full commitment to his parental responsibilities" in a sufficient and timely way.<sup>153</sup>

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the well-being of illegitimate children" and concluded that adoption was too narrow an objective. *Id.* at 1233-34 (quoting from *Caban v. Mohammed*, 441 U.S. 380, 391 (1979)). The court went on to find no evidence of a substantial correlation between allowing the birth mother to determine the father's rights, and the child's well-being. *Id.* It noted anomalies in the statute which provided more protection against termination of parental rights to mothers who were "unready, unwilling, and unable" to be a responsible parent than to a father who was "ready, willing, and able." *Id.* at 1235. It deemed the distinction between presumed and natural fathers to be irrational. *Id.* Moreover, the court reasoned that the distinction between natural and presumed fathers ignored the child's best interests, because a fit natural father could be precluded from contesting an adoption, while a "highly questionable" presumed father could withhold his consent, unless shown to be unfit by clear and convincing evidence. *Id.* at 1236.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 1237.

152. *Adoption of Kelsey S.*, 823 P.2d 1216, 1237 (Cal. 1992).

153. *Id.* The court also examined how cases like *Kelsey S.* come before the courts. The mother seeks to sever, as a legal matter, all ties with her child. *Id.* at 1236. On the other hand, the natural father desires to assume a parental responsibility. The court noted that not only was the father being treated unfairly, but the statute did not account for the "loss to the child." *Id.* The court characterized this loss as the unique genetic bond the child shares with its natural parents. *Id.*

## 2. *Michael H.*

Prior to the California Supreme Court's decision in *Kelsey S.*, a custody battle began over an infant named Michael H. in San Diego, California.<sup>154</sup> The legal fight over Michael H. presented the first opportunity for the lower courts to apply the rule formulated in *Kelsey S.* While the events surrounding Michael H. paralleled *Kelsey S.*,<sup>155</sup> the San Diego County Superior Court incorporated the child's best interests in such a way as to allow the prospective adoptive parents to retain custody.

The relationship between Michael's biological parents ended before his birth.<sup>156</sup> The couple initially considered placing their child for adoption, however, the biological father changed his mind.<sup>157</sup> Later, when Michael's birth mother was five months pregnant, they fought, and she left for San Diego.<sup>158</sup> Michael was born in San Diego on February 27, 1991.<sup>159</sup>

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154. The facts of this case have been pieced together from the popular press, a depublished appellate decision, and the most recent San Diego County Superior Court decision. Wherever possible, factual information is cited to either of the two cases available. There are instances where clarity and completeness required reliance on the popular press. However, all relevant legal issues and determinations may be found only in the two cases.

155. Under the California Civil Code section 7004 (now Family Code section 7611), the Superior Court for the County of San Diego determined that Michael's biological father, was not a presumed father. *In re Adoption of Michael H.*, 11 Cal. Rptr. 2d 261, 261 (1992), *depublished* Dec. 31, 1992. Accordingly, the court terminated his parental rights and referred Michael for adoption by his prospective adoptive parents, who it appointed as Michael's temporary guardians. *Id.* at 261-62.

156. In the Guardianship of Michael H., No. A37092, slip op. at 2 (Cal. Super. Ct., San Diego County, Juv. Div., 1993).

157. Until the birth mother was three months pregnant, the birth father said he would consider adoption as an alternative for the baby. *Michael H.*, 11 Cal. Rptr. 2d at 263. Apparently, however, he changed his mind. He asked the birth mother to move up the date for their wedding, took videos of the baby's sonogram, and even attended birthing classes whether the birth mother came with him or not. *Id.*

158. According to the popular press, Michael's biological father was arrested for assaulting his birth mother during this fight, although the charges were later dropped. Brigitte Greenberg, *Dad Cleans Up His Life, Tries To Get Son Back*, CHI. TRIB., Sept. 8, 1993, (Evening Ed.), at 8; Tony Perry, *Adoption Battle Raises Painful Questions; Families: San Diego Case Is The First Under A State Law Giving Unwed Fathers More Clout in Custody Fights*, L.A. TIMES, Aug. 7, 1993, at A1.

159. *Michael H.*, 11 Cal. Rptr. 2d at 263.

Reminiscent of the Jessica DeBoer case, Michael's prospective adoptive parents harbored concerns about his biological father's commitment to and ability to care for Michael.<sup>160</sup>

Michael's prospective adoptive parents filed formal adoption papers on April 18, 1991.<sup>161</sup> The papers did not mention the biological father's bid for custody in the Arizona courts,<sup>162</sup> nor did the biological father receive notice that adoption papers had been filed.<sup>163</sup> The adoption case was tried in October of 1991. The superior court ruled that it was in Michael's 'best interests' to terminate the biological father's parental rights and authorized the baby's adoption by the prospective adoptive parents.<sup>164</sup>

Michael's biological father appealed the termination of his parental rights. While the case was pending in the Fourth Appellate District Court in San Diego, the California Supreme Court decided *Adoption of Kelsey S.*<sup>165</sup> Based on the decision in *Kelsey S.*, the Fourth Appellate District reversed the superior court's termination of parental rights and remanded the case back to the superior court to determine whether Michael's biological father had demonstrated a sufficient commitment to his parental responsibilities.<sup>166</sup> While the appellate court could not rule directly on whether Michael's biological father had met the standards set forth in

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160. Michael's biological father dropped out of high school, and has a history of drug and alcohol abuse. Alan Abrahamson, *Key Court Test Will Set Baby Boy's Future*, L.A. TIMES, Sept. 14, 1994, at B1; Perry, *supra* note 158, at A1. His family in Prescott, Arizona, where he lives and hopes to bring Michael, has been portrayed as "dysfunctional" and "alcoholic" with an "unstable lifestyle." Abrahamson, *supra* at B1. Michael's biological father also attempted suicide after he and Michael's mother broke up. *In re Adoption of Michael H.*, 11 Cal. Rptr. 2d 261, 263 (1992), *depublished* Dec. 31, 1992.

161. *Michael H.*, 11 Cal. Rptr. 2d at 263.

162. On February 28, 1991, in Arizona, Michael's biological father filed legal papers he prepared himself in which he sought to establish paternity and custody. *Id.* He did not know until he was contacted by the San Diego County Department of Social Services that Michael had been born and that the birth mother had decided to place him for adoption. Abrahamson, *supra* note 160, at B1.

163. *Id.*

164. Abrahamson, *supra* note 160, at B1.

165. *In the Guardianship of Michael H.*, No. A37092, slip op. at 2 (Cal. Super. Ct., San Diego County, Juv. Div., 1993).

166. *In re Adoption of Michael H.*, 11 Cal. Rptr. 2d 261, 266 (1992), *depublished* Dec. 31, 1992.



*Kelsey S.*, the decision contained numerous inferences that, in all likelihood, he had.<sup>167</sup>

On remand, the superior court found that Michael's biological father had indeed met the standards set forth in *Kelsey S.*, and accordingly should be treated as a presumed father.<sup>168</sup> Due to the fact that Michael's biological mother strongly opposed his biological father obtaining custody of their child,<sup>169</sup> the choice next faced by the trial judge was not between placing Michael with his prospective adoptive parents versus his biological father, but rather "placement with the [prospective adoptive parents] or placement with both natural parents who will then fight for custody over him."<sup>170</sup> Given that the custody dispute between the biological parents must be resolved in family court, the only issue which remained before the superior court was whether the prospective adoptive parents or the biological father should be granted guardianship of Michael.<sup>171</sup>

On the issue of guardianship, the trial judge decided in favor of the prospective adoptive parents. Under relevant law,<sup>172</sup> since the biological father objected to the guardian-

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167. See *id.* Each time the court compared the facts of the instant case with *Kelsey S.* it implied that Michael's biological father had met the *Kelsey S.* standard. *Id.*

168. In the Guardianship of Michael H., No. A37092, slip op. at 3 (Cal. Super. Ct., San Diego County, Juv. Div., 1993). Reportedly, Michael's biological father turned his life around. "[H]e has been clean of cocaine, marijuana, methamphetamine and alcohol for nearly three years." Perry, *supra* note 158, at A1. He also received his high-school equivalency diploma. *Id.* He gained employment, and found an apartment in Prescott where he and Michael can live. *Michael H.*, 11 Cal. Rptr. 2d at 264; In the Guardianship of Michael H., No. A37092, slip op. at 6 (Cal. Super. Ct., San Diego County, Juv. Div., 1993). He has also arranged for child care while he is at work. *Michael H.*, 11 Cal. Rptr. 2d at 264; In the Guardianship of Michael H., No. A37092, slip op. at 6 (Cal. Super. Ct., San Diego County, Juv. Div., 1993).

169. Michael's birth mother continues to support placement of Michael with the adoptive parents she chose for him, and has vowed that she will petition for custody herself rather than let the biological father gain custody of Michael. In the Guardianship of Michael H., No. A37092, slip op. at 3 (Cal. Super. Ct., San Diego County, Juv. Div., 1993).

170. *Id.*

171. *Id.*

172. According to the superior court decision:

Probate Code § 1514(a) authorizes establishment of a guardianship "if it appears necessary or convenient." However, before a court can award custody of a child to a non-parent without the consent of the parents, Civil Code § 4600(c) requires that the court "make a finding that an award of custody to a parent would be detrimental to the child

ship, there remained two issues for the court to resolve: first, whether the award of custody to his biological father would be *detrimental* to Michael, and second, whether awarding custody to his prospective adoptive parents was required to serve Michael's *best interests*.<sup>173</sup> The court found that removing Michael from the only home he had ever known would be a great detriment to his development.<sup>174</sup> The court based this finding on uncontroverted testimony of four psychologists that Michael had formed a "clear and strongly attached primary bond" with his prospective adoptive mother, as well as the other members of the family which had raised him.<sup>175</sup> All four experts testified that removing Michael from his home at this juncture in his life would be detrimental to his future development.<sup>176</sup> Moreover, Michael's prospective adoptive mother testified to regressions in Michael's development during the four months before the trial.<sup>177</sup>

The court recognized that while Michael's biological father had met the standards set forth by *Kelsey S.*, the circumstances of the case had reached a point where the inevitable harm to Michael outweighed the rights of his biological father.<sup>178</sup> According to the court, "[w]hen exercise of parental rights would be demonstrably harmful to the child, the court's obligation is to protect the child."<sup>179</sup> After challenging the biological father and prospective adoptive parents to work together on the issue of visitation for Michael's sake,<sup>180</sup> the

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and the award to a non-parent is required to serve the best interests of the child."

*Id.* at 4. Civil Code section 4600(c) is now Family Code section 3041. See CAL. FAM. CODE § 3041 (West 1995).

173. In the Guardianship of Michael H., No. A37092, slip op. at 5 (Cal. Super. Ct., San Diego County, Juv. Div., 1993) (emphasis added).

174. *Id.* at 13-14.

175. *Id.* at 6.

176. See *id.* at 5-11.

177. *Id.* at 11. Michael regressed in his toilet training, and began using a bottle again. *Id.* Also, after one of his biological father's scheduled visits, Michael had several nightmares where he woke up "crying and screaming, . . . Mommy bye, bye. Daddy bye, bye, J.T. [sibling] bye, bye." *Id.*

178. See In the Guardianship of Michael H., No. A37092, slip op. at 17 (Cal. Super. Ct., San Diego County, Juv. Div., 1993).

179. *Id.* (referring generally to *Stantosky v. Kramer*, 455 U.S. 745 (1982) and *Stanley v. Illinois*, 405 U.S. 645 (1972)).

180. See *id.* at 18-20.

court ordered that guardianship of Michael be granted to his prospective adoptive parents.<sup>181</sup>

### E. Attachment Theory

The psychology of attachment generally goes unrecognized in case law. For example, in *Kelsey S.*, the California Supreme Court mentioned the uniqueness of a child's genetic bond with its natural parents rather than any relationship a child forms with the person who cares for her.<sup>182</sup> The dissent in *In re Doe*,<sup>183</sup> however, recognized the importance of attachment in arguing for the expeditious determination of such custody decisions.<sup>184</sup> Moreover, Michael H.'s stage in the development of his attachments became a crucial factor in the San Diego County Superior Court's analysis.<sup>185</sup> As such, it is important to understand the psychological implications of removing a child from her adoptive home.

#### 1. Overview of Attachment

Attachment is a term psychologists use to describe the early relationships between an infant or child and the person who consistently, though not necessarily perfectly, responds to her communicated needs.<sup>186</sup> The development and existence of such a close intimate relationship is a fundamental requirement of human development.<sup>187</sup>

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181. *Id.* at 20.

182. Adoption of *Kelsey S.*, 823 P.2d 1216, 1236 (Cal. 1992) (emphasis added). Attachment theory deals with *relationships* not genetics. A child's biological or genetic relationship to her primary caretaker does not make the "attachment." The interpersonal relationship between the caretaker-parent and the child determines the type and level of attachment. See discussion *infra* part II.F.1. For simplicity, only the female pronoun will be used to avoid the complexities of using both gender pronouns or the plural.

183. 627 N.E.2d 648, 656 (Ill.) (Tully, P.J., dissenting), *appeal granted* 624 N.E.2d 807 (Ill. 1993), *and rev'd* 638 N.E.2d 181 (Ill.), *reh'g denied* July 12, 1994, *cert denied sub nom.* Baby Richard v. Kirchner, 115 S. Ct. 499 (1994), *application denied, stay denied sub nom.* O'Connell v. Kirchner, 115 S. Ct. 891, *stay denied*, 115 S. Ct. 1084 (1995).

184. *Id.* at 666-67.

185. See *In the Guardianship of Michael H.*, No. A37092, (Cal. Super. Ct., San Diego County, Juv. Div., 1993).

186. Eleanor Willemssen, *In The Best Interests Of Babies: Attachment Issues in Infant Placement Decisions* (Proposal, on file with author, Psychology Department, Santa Clara University).

187. *Id.*

The major concepts in attachment theory are as follows. First, "[a]ttachment is a basic human need."<sup>188</sup> The development of a close attachment relationship between a caregiver and an infant gives the infant a secure base from which the child may explore the world around her as a separate person.<sup>189</sup> This base allows the infant to learn about her surroundings—the world—and relate to other people she encounters.<sup>190</sup> Finally, the result of a secure attachment gives the child a "mental representation of herself as a participant in a loving relationship with another person."<sup>191</sup> This image then guides the child's future relationships.<sup>192</sup>

There exists a critical period in a child's life when attachment must occur or it will not develop at all.<sup>193</sup> Research has shown that most infants become attached to their caregivers by the time they are six to nine months old.<sup>194</sup> Infants lacking primary caregivers during the early months of life are capable of forming normal attachments if adopted soon after their first birthday.<sup>195</sup> After an infant has reached eighteen months, however, she will not readily form attachments to new caregivers.<sup>196</sup>

Attached infants become very disturbed if they are separated from their primary caregivers and do not readily accept substitute caregivers.<sup>197</sup> The leading theorist on attachment, John Bowlby, found that infants separated from their parents (caregivers) during their first year exhibited three behaviors: protest, despair, and detachment.<sup>198</sup> When an infant protests, she "actively and vigorously" does those things, such as crying, that would normally call her caregiver to her.<sup>199</sup> She will be angry that her caregiver, to whom she has developed an attachment, does not appear.<sup>200</sup> Later, the infant will ex-

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188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. NEIL R. CARLSON, *PSYCHOLOGY: THE SCIENCE OF BEHAVIOR* 240 (1984) (citation omitted).

194. *Id.*

195. *Id.* (citation omitted).

196. *Id.* (citation omitted).

197. *Id.*

198. *Id.* at 241 (citation omitted).

199. *Id.*

200. *Id.*

perience despair, which is characterized by a lack of responsiveness to those around her, and become inactive and withdrawn.<sup>201</sup> Finally, in the detachment phase, the infant will appear normal to her new caregivers, but when reunited with her initial caregivers she will show no evidence of the former bond between them.<sup>202</sup>

## 2. *Role of Attachment in Development*

For a child to develop normally, she must learn to explore and interact with her environment independently. The presence of an infant's primary caregiver when she first begins to explore offers reassurance. While the new and unfamiliar environment causes fear, the caregiver "provides a secure base that the infant can leave . . . to see what the world is like."<sup>203</sup>

A secure attachment provides a host of benefits to a young child. A child who is securely attached demonstrates a better ability to explore alone, separate when necessary and operate independently, than a child who has not formed a secure attachment.<sup>204</sup> The same child also has a higher self awareness.<sup>205</sup> Secure attachment also translates into better sensory-motor skills, the ability to master the environment through one's senses.<sup>206</sup> This leads to heightened intellectual development. Other positive aspects of a secure attachment include early and more effective language development and enhanced social skills.<sup>207</sup>

## 3. *Recognition of Attachment Theory in Mentioned Case Law*

In *Guardianship of Michael H.*, the testimony of four psychologists regarding attachment theory proved very persuasive to the San Diego Superior Court. One psychologist testified that "early attachment and bonding to parent figures

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201. *Id.*

202. *Id.*

203. *Id.* at 242.

204. Eleanor Willemsen, In The Best Interests Of Babies: Attachment Issues in Infant Placement Decisions: Attachment 101 (unpublished draft, on file with the author, Psychology Department, Santa Clara University).

205. *Id.*

206. *Id.*

207. *Id.*

is seen by psychologists as 'the bedrock of socialization.'<sup>208</sup> Michael had developed a "primary attachment to the only mother he had ever known."<sup>209</sup> Expert testimony established that a disruption of this attachment relationship would be "an extraordinarily dangerous experience for a child"<sup>210</sup> potentially leading to "conduct disorders and antisocial development."<sup>211</sup>

The psychologists testified to the specific and probable effects of removing Michael from his prospective adoptive parents at age two and one-half. The first expert stated that disruption of this developmental period would "take away the child's innate abilities to learn, to grow and to develop in a normal fashion . . . ."<sup>212</sup> Another testified that removal of a two and one-half year old from his family risked "ongoing impairment of the child's abilities to trust, feel self confident, tolerate appropriate separations when older, or form additional attachments."<sup>213</sup> Even the expert called to testify on behalf of Michael's biological father, who sought to remove Michael, agreed that the proposed removal would be a "nightmare" for the child.<sup>214</sup>

In the Illinois appellate case, *In re Doe*,<sup>215</sup> the dissent mentioned the findings of John Bowlby to underscore its contention that these cases should be expedited for the sake of the children involved. The dissent pointed out that "when no one person has cared for an infant for more than a few months, the child should not yet have developed a dependency on any one person at the time of placement. Thus,

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208. In the Guardianship of Michael H., No. A37092, slip op. at 7 (Cal. Super. Ct., San Diego County, Juv. Div., 1993).

209. *Id.* at 15.

210. *Id.* at 7.

211. *Id.*

212. *Id.*

213. In the Guardianship of Michael H., No. A37092, slip op. at 8 (Cal. Super. Ct., San Diego County, Juv. Div., 1993).

214. *Id.* at 9-10.

215. *In re Doe*, 627 N.E.2d 648 (Ill.), *appeal granted* 624 N.E.2d 807 (Ill. 1993), *and rev'd* 638 N.E.2d 181 (Ill.), *reh'g denied* July 12, 1994, *cert. denied sub nom.* Baby Richard v. Kirchner, 115 S. Ct. 499 (1994), *application denied, stay denied sub nom.* O'Connell v. Kirchner, 115 S. Ct. 891, *stay denied*, 115 S. Ct. 1084 (1995).

placing the infant in a new setting should not have an adverse impact on him."<sup>216</sup>

Consequently, custody battles for infants in independent adoption situations become, in part, issues of timing. If not rectified soon enough, removal will harm the child, yet early disposition of the case will likely involve removal from the prospective adoptive home and placement with the birth parent who sought custody.

### III. IDENTIFICATION OF THE PROBLEM

The above background material introduces the reader to a complex area of independent adoption law: What happens when a birth father contests the proposed adoption of his child after the child is in the custody of her prospective adoptive parents. Fortunately, such contests are rare. Their rarity, however, does not make them any less devastating for all the parties involved. A distinct tension exists in the law among the constitutionally protected rights of the biological father, the lack of protection for the prospective adoptive parents, and, in many cases, the inability of the court to consider the actual effect of its decision on the child. Accordingly, the court loses sight of what is, and should be, of paramount importance—protecting the well-being of the child.

### IV. ANALYSIS

The psychological study of infant attachment discussed above provides the framework for subsequent analysis of this problem.<sup>217</sup> As the Superior Court of San Diego recognized, "[w]hen exercise of parental rights would be demonstrably harmful to the child, the court's obligation is to protect the child."<sup>218</sup> Protecting the child should mean preventing harm to the child and should spark a detriment analysis.<sup>219</sup> The challenge is in shifting the focus of the court away from the rights of the adults involved, whether they are the constitu-

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216. *Id.* at 664 n.1 (Tully, P.J., dissenting) (citation omitted). The Illinois Supreme Court, however, apparently rejected attachment as a factor. *See supra* text accompanying notes 54-59.

217. *See supra* part II.E.

218. In the Guardianship of Michael H., No. A37092, slip op. at 17 (Cal. Super. Ct., San Diego County, Juv. Div., 1993).

219. A detriment analysis involves "a clear showing that [award of custody to the non-parent] is essential to avert harm to the child." *Id.* at 12 (quoting from *In re B.G.*, 523 P.2d 244 (Cal. 1974)).

tional rights of the biological father or the statutory rights of the prospective adoptive parents, and placing the focus on the impact that the decision requested of the court will have on the child. If the impact will be harmful, then that avenue should not be pursued.

#### A. *Rights of the Biological Father*

The supremacy of the rights of the biological father over those of the prospective adoptive parents or the interest of his own child proved to be the dispositive factor in the disposition of the cases determining custody of Jessica DeBoer and Baby Richard.<sup>220</sup> Under state law, the Iowa court could not consider the effect of its required decision on Jessica.<sup>221</sup> Iowa law dictates that in the absence of the biological parents' consent to the child's adoption, the court may not consider whether the adoption promotes the welfare and best interests of the child.<sup>222</sup>

While the state may have a legitimate interest in preventing children from being removed from homes and placed for adoption over the objection of the biological parents, the wording of this statute backfires when it is applied in cases where the child has been placed for adoption by one parent and the other parent later objects. It backfires because the court will not hear evidence and testimony regarding the effect a change in custody will have on the child in question. Thus, protection of the child, in the sense of avoiding harm to the youngster, falls victim to biology. Likewise, as in the case of Baby Richard, the court fails to consider whether adoption serves either the welfare or the best interest of the child, absent a showing of unfitness or abandonment on the part of the biological parent seeking custody.

The disposition of these cases underscores the problem by presenting the unconscionable result that a newly named genetic father can upset a potential adoption or even overturn a final adoption, despite the fact that this may be extremely detrimental to the child.<sup>223</sup> These harsh outcomes, however, need not occur in California.

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220. See *supra* part II.A.1-2.

221. *In re Clausen*, 502 N.W.2d 649, 660 n.30 (Mich.), *stay denied sub nom. DeBoer v. DeBoer*, 114 S. Ct. 1, and *stay denied*, 114 S. Ct. 11 (1993).

222. See *supra* notes 74-78 and accompanying text.

223. See *supra* part II.A.1-2.



Following the line of United States Supreme Court cases which delineate the rights of biological fathers,<sup>224</sup> the California Supreme Court found unconstitutional a statutory distinction between presumed and natural fathers which gave fathers determined to be "presumed" rather than "natural" more rights in adoption custody decisions.<sup>225</sup> The *Kelsey S.* decision eliminates the distinction between natural and presumed fathers only in cases where an otherwise natural father under the statute has demonstrated a "full commitment" to raise the child. Consent is not required of a natural father who fails to demonstrate a full commitment to custody.<sup>226</sup> With this distinction eliminated, the consent of the birth father meeting the *Kelsey S.* standard is required for the adoption of the child.<sup>227</sup>

The court also determined that biology is not enough; the birth father must make an adequate showing of commitment to the child in order to contest an adoption. The state's interests in the child's well being is important and deserves protection. The standard set by the court requires consideration of the birth father's conduct both before and after the child's birth. He must demonstrate his willingness to take custody of the child; further, his motivation may not simply be to block the adoption. Relevant to a determination of commitment are the father's acknowledgment of paternity, helping the mother with pregnancy and birth expenses to the best of his ability, and the speed at which he takes legal action.<sup>228</sup>

While these standards appear straightforward, they create some uncertainty. The court stated that the father must attempt to assume his responsibilities as soon as he "knows or reasonably should know" of the birth mother's pregnancy.<sup>229</sup> What if the birth mother does not tell him of the pregnancy, and he finds out later, months or even years after the child is born? If he then attempts to gain custody, will his lack of consent be determinative? He took action as soon as he found out about the child. His commitment is genuine.

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224. See *supra* notes 21, 141.

225. See *supra* notes 129-30 and accompanying text.

226. See *supra* text accompanying notes 136-38.

227. See *supra* note 138 and accompanying text.

228. See *supra* text accompanying notes 147-52.

229. Adoption of *Kelsey S.*, 823 P.2d 1216, 1236 (Cal. 1992).

The door appears to be left open to these types of challenges—even to final adoptions.<sup>230</sup>

The scenario just described illustrates a significant loophole in the *Kelsey S.* decision. The wording used by the court activates the start of any action by the birth father toward full commitment "[o]nce he knows or reasonably should know of the pregnancy."<sup>231</sup> A birth father may not reasonably be expected to know of a pregnancy if he has had no contact with the birth mother for the duration of the pregnancy. If the father, upon finding out about his child, had attempted to regain custody before the adoption had been finalized, he might have succeeded in his challenge (under Family Code section 8815 in effect until January 1, 1995).<sup>232</sup> Now, however, the new section 8815 requires that action be taken by the biological father during the first four months after the child's birth in order to succeed.<sup>233</sup> Yet, if he meets the *Kelsey S.* standards, a birth father may make the case that his parental rights were wrongly, falsely or unjustly terminated, and that he was ready, willing and able to assume responsibility at the time of the child's birth. This may occur *years* after the adoption has been finalized. Thus, *Kelsey S.*, while properly bringing a known father into the picture, may also provide an opportunity for an unknown father to appear later and challenge the custody or adoption of his child.

*Kelsey S.* does not address the proper disposition of the custody case. It merely sets forth the rights the birth father has to contest the adoption and the standards to determine whether or not he may properly exercise those rights. The California Supreme Court left the lower courts to grapple with what to do next.

Until January 1, 1995, once determined to be a presumed father (either by meeting the conditions of Family Code section 7611 or the standards of *Kelsey S.*), the father may contest the adoption by withdrawing his consent under Family Code section 8815. According to the statute, "[i]f the court finds that withdrawal of the consent to adoption is reasonable

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230. This is almost exactly what occurred in Illinois to Baby Richard, the difference being that the biological father knew of the pregnancy, but not of the birth or the adoption. See *supra* text accompanying notes 26-33.

231. *Kelsey S.*, 823 P.2d at 1236.

232. See *supra* text accompanying notes 110-11.

233. See *supra* part II.C.2.

in view of all the circumstances *and* that withdrawal of the consent is *in the child's best interest*, the court *shall* approve the withdrawal of consent."<sup>234</sup> Thus, granting custody to the birth father is not automatic—he must first show that his withdrawal of consent is reasonable and that it is in the child's best interest for him not to consent to the adoption.

The statute next articulates its test for best interest determinations. A best interest analysis includes,

but is not limited to, an assessment of the child's age, the extent of bonding with the prospective adoptive parent or parents, the extent of bonding or the potential to bond with the birth parent or parents, and the ability of the birth parent or parents to provide adequate and proper care and guidance to the child.<sup>235</sup>

In California, a best interest determination can easily accommodate the incorporation of attachment theory.

Critical components of attachment theory, the age of the child and the extent of bonding with the prospective adoptive parents, are already incorporated in the best interest analysis. A court should look at a child's age in terms of attachment development in an infant. Research has demonstrated that attachments must form between six and eighteen months of age or they may not develop at all.<sup>236</sup> Moreover, as demonstrated by the testimony regarding Michael H., at two and one-half a child is "at the entry phase [ages two to five] of the most important developmental period in a person's life."<sup>237</sup> Disruption at this point impacts a child's innate abilities of learning and normal development, including ability to trust and feel self confident. It also impacts negatively on a child's ability to form additional attachments and tolerate appropriate separations in the future.<sup>238</sup> As to bonding, a psychologist can study the interaction of the child and the prospective adoptive parents to determine the extent and quality of attachment with the prospective adoptive parents.

The statute also mandates, however, an examination of the "*potential to bond* with the birth parent," as well as the

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234. CAL. FAM. CODE § 8815(d) (West 1995) (emphasis added).

235. *Id.*

236. *See supra* text accompanying notes 193-96.

237. In the Guardianship of Michael H., No. A37092, slip op. at 7 (Cal. Super. Ct., San Diego County, Juv. Div., 1993).

238. *See supra* text accompanying notes 197-202, 208-14.

birth parent's ability to provide care and guidance to the child.<sup>239</sup> Without looking at the psychology of attachment, these factors weigh heavily in favor of placement with the birth father. In *Kelsey S.* the court characterized the "loss to the child" in terms of the "genetic bond" shared with its natural parents to conclude that absent a showing of unfitness on the part of the father, "[the] child is ill served by allowing its mother effectively to preclude the child from ever having a meaningful relationship with its only other biological parent."<sup>240</sup> This holds true, however, only to the extent that an attachment by the child to another caregiver has not been formed. Once that attachment forms and exists long enough, detrimental effects are inflicted on the child by forcibly breaking a critical psychological and developmental bond in favor of genetics.<sup>241</sup>

As of January 1, 1995 the foregoing analysis changed. The court is no longer to be involved in performing a best interests analysis. Under section 8815, operative January 1, 1995, if the birth father withdraws his consent within the 120 day time frame, the prospective adoptive parents have no recourse.<sup>242</sup> They must relinquish the child.<sup>243</sup> This change in the law greatly expands the power and influence of the birth father without due consideration of the prospective adoptive parents or the child.

In *Adoption of Michael H.*,<sup>244</sup> the California Appellate Court remanded the superior court's termination of the parental rights of Michael's biological father back for disposition in light of the standards set forth by *Kelsey S.*<sup>245</sup> While the appellate court stated that it did not have sufficient facts before it to make the determination since the issue had not been before the lower court, it repeatedly inferred that the standards had been met by Michael's biological father.<sup>246</sup> On remand, the superior court determined that the actions taken by Michael's biological father complied with the *Kelsey S.* re-

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239. CAL. FAM. CODE § 8815(d) (West 1995)

240. *Adoption of Kelsey S.*, 823 P.2d 1216, 1236 (Cal. 1992).

241. See *supra* part II.E.

242. See *supra* notes 120-23 and accompanying text.

243. See *supra* part II.C.2.

244. 11 Cal. Rptr. 2d 261 (1992), *depublished* Dec. 31, 1992.

245. See *supra* text accompanying notes 165-66.

246. See *supra* note 167 and accompanying text.

quirements.<sup>247</sup> As a result, his lack of consent meant that Michael's prospective adoptive parents could not finalize his adoption.

The superior court, however, did not automatically conclude that custody of Michael must then necessarily go to his biological father. Michael's biological father objected to the adoption. He also objected to the prospective adoptive parents retaining guardianship of Michael. However, the birth father's compliance with *Kelsey S.* did not prove dispositive. The court took its charge of protecting the child very seriously. Given the facts of the case, and the strength of expert testimony regarding the likely harm to Michael from any change in custody, the judge properly decided that Michael should remain in the only home he has ever known.<sup>248</sup>

#### B. "Rights" of Adoptive Parents

At least one commentator described the rights of adoptive parents as a specter.<sup>249</sup> Without parental consent to an adoption, the prospective adoptive parents, in reality, have very little recourse except to return the child if so ordered by the court.

The plight of Jessica DeBoer underscores the problem area faced in independent adoptions—lack of standing for prospective adoption parents.<sup>250</sup> When the Iowa court revoked the temporary custody grant to Jessica's prospective adoptive parents, they became "third parties" in relation to Jessica, and thus had no substantive right to custody of the child they had raised since birth.<sup>251</sup>

In *Guardianship of Michael H.*,<sup>252</sup> the superior court circumvented the standing issue. The birth mother so strongly

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247. See *supra* text accompanying note 168.

248. See *supra* part II.D.2.

249. See Janet Hopkins Dickenson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 990 (1991).

250. See *supra* note 83 and accompanying text. The Michigan Supreme Court rejected the arguments put forth by Jessica's prospective adoptive parents and affirmed the appellate court ruling that they lacked standing to claim custody of the child. Legally, Jessica's prospective adoptive parents were "third parties" with respect to her. *In re Clausen*, 502 N.W.2d 649, 662, 663 (Mich.), *stay denied sub nom.* DeBoer v. DeBoer, 114 S. Ct. 1, and *stay denied*, 114 S. Ct. 11 (1993).

251. See *supra* note 83.

252. No. A37092, slip op. (Cal. Super. Ct., San Diego County, Juv. Div., 1993).

objected to the birth father gaining custody of their biological child, she vowed she would revoke her consent and fight Michael's birth father for custody.<sup>253</sup> Accordingly, the judge's decision was not between the biological father and adoptive parents, but between the biological father and adoptive parents with the knowledge that should custody go to the biological father, another custody battle for Michael would ensue between the birth parents.<sup>254</sup> After the termination of adoption proceedings, Michael's prospective adoptive parents requested guardianship be granted to them. Guardianship does not require the relinquishment of the biological father's parental rights so, unlike adoption, it does not create a new legal family. It does, however, allow Michael to remain in his home.<sup>255</sup>

The guardianship determination required the court to find that awarding custody of Michael to his biological father would be detrimental to Michael, and that remaining with his prospective adoptive parents served Michael's best interests. Although determined on the basis of the same evidence, the two tests are distinct. The finding of a detriment was "intended to limit placement with a non-parent to extreme cases and to shift the focus of the inquiry away from the parent's failings and toward the child's protection."<sup>256</sup> Accordingly, a finding of detriment requires "a clear showing that [award of custody to the non-parent] is essential to avert harm to the child."<sup>257</sup> On the other hand, the best interest of the child is a matter of judicial discretion.<sup>258</sup>

The only new piece of California legislation that addresses on the fears of the prospective adoptive parents and attempts to alleviate their plight is the creation of an identified adoption.<sup>259</sup> While the purpose of this legislation, as stated in committee analysis, is to "protect the right of a birth parent to select adoptive parents in this alternative form of

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253. See *supra* note 169 and accompanying text.

254. See *supra* text accompanying notes 169-70.

255. See *supra* text accompanying notes 172-81.

256. In the Guardianship of Michael H., No. A37092, slip op. at 12 (Cal. Super. Ct., San Diego County, Juv. Div., 1993).

257. *Id.* (quoting from *In re B.G.*, 523 P.2d 244 (Cal. 1974)).

258. *Id.*

259. See *supra* part II.C.3.

agency adoption,"<sup>260</sup> it does serve indirectly to alleviate the problem under scrutiny here. Since relinquishment differs fundamentally from consent,<sup>261</sup> identified adoptions might allay fears of prospective adoptive parents that the birth parents will change their minds and request return of the child. Insecurity abounds in independent adoptions due to the lack of any time limits on consent orders.

Other legislation eliminates rights previously held by prospective adoptive parents. Under new section 8815, the prospective adoptive parents lose their consideration under the old section 8815 which had required a best interest analysis of the child's bonding with them.<sup>262</sup> They go unheard so long as the child has been in their custody under four months.

### C. *"Rights" of the Child*

The Jessica DeBoer cases show that Iowa does not consider the welfare or interests of the child in cases where a parent contests a pending adoption.<sup>263</sup> The example of Baby Richard illustrates the strength of a biological father's rights; his consent will be required, and, if not properly obtained or absent a showing of parental unfitness, the welfare or interests of the child will not be considered.<sup>264</sup> However, Michigan and California courts, to varying degrees, do consider the welfare and interests of the child.<sup>265</sup>

Jessica's prospective adoptive parents wanted Michigan courts to hear the case in order to have Jessica's interests considered. The Michigan court reasoned that, as the law currently stands, courts of each state are free to fashion their own law regarding family relationships. Michigan could not find a decision rendered in Iowa unenforceable simply because it did not hold a hearing on the interests of the child.<sup>266</sup> This raises another issue—different substantive laws in each state when adoptions cross state lines. The 1969 version of

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260. CALIFORNIA COMMITTEE ANALYSIS, SENATE COMMITTEE ON JUDICIARY BILL No. A.B. 3456, June 30, 1992 available in LEXIS, Cal Library, Cacomm File.

261. See *supra* text accompanying notes 102-05.

262. See *supra* part II.C.2.

263. See *supra* part II.A.2.

264. See *supra* part II.A.1.

265. See *supra* text accompanying notes 83, 140, 146, 168-87.

266. See *supra* part II.A.2.

the Uniform Adoption Act did not receive much support.<sup>267</sup> The Act, however, has been revised.<sup>268</sup> Due to the national attention paid to egregious cases, such as those of Baby Richard and Jessica DeBoer, hopefully more support will be given to the new Uniform Adoption Act.

The Illinois Court of Appeals correctly recognized that children do not *belong* to either adoptive or biological parents. Accordingly, in adoption custody cases, the child is the real party in interest. As the real party in interest, the child's interests supersede a biological father's right to custody. Moreover, the court astutely emphasized that the best interest of the child is not a factor to be balanced as part of an equation. Rather it stands on its own, "inviolable and impregnable." Adoption offers important benefits to children, not the least of which is an alternative to foster care and, consequently, the opportunity to form a primary attachment relationship which promotes better adjusted, more secure individuals. The Illinois Supreme Court, however, reduced the findings of the appeals court to wishful thinking.<sup>269</sup>

Hope for a shift in the courts' focus exists in California. The guidance offered by the state's highest court in *Kelsey S.* stops at the point of determining when the court requires the consent of a "natural" father in an adoption proceeding. As discussed above, the best interest analysis allows for a critical assessment of the child's attachment. However, this is in danger of expiring. Further, in *Guardianship of Michael H.*, the court correctly determined, under the detriment and best interest analyses required for guardianship determinations in favor of non-parents, that while the biological father had done all he could, the potential harm to the child of granting him custody outweighed his rights.<sup>270</sup>

#### D. *Inadequacy of Current Law and Recent Legislation*

While the recent legislative changes discussed above are important and significant, they focus on the rights and needs of the birth parent placing a child for adoption. They make no provisions for the birth parent, usually the birth father, not placing the child for adoption. Moreover, they do not sig-

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267. See *supra* part II.B.

268. See *supra* part II B.

269. See *supra* part II.A.1.

270. See *supra* text accompanying notes 173-81.



nificantly alter the rights or address the needs and fears of the adoptive parents. Finally, no changes regarding protections for the child at issue are mentioned.<sup>271</sup>

The provision of counseling for the birth parent(s) placing a child for adoption under Family Code section 8801.5 has taken effect.<sup>272</sup> While this marks a significant change from the previous process, which did not require counseling, it does not go far enough. Counseling is not provided for the birth father, regardless of his statutory status, if he is not placing the child.<sup>273</sup> The assumption might be made that if the statute requires his consent for the adoption then he will be counseled. However, the Family Code states that only the "birth parent placing a child for adoption shall be advised of his or her rights by an adoption service provider."<sup>274</sup> Moreover, the legislative history denotes that part of the purpose of the legislation was to clarify that only the birth parent placing the child receives counseling.<sup>275</sup> The intent of the legislation was *not* to require counseling for non-placing parents.<sup>276</sup> Accordingly, a "natural" father would receive no counseling. Yet, he may wish to obtain custody of the child. In addition, he may be able to meet the requirements of *Kelsey S.* in order to move himself into the category of a presumed father from whom consent is required. Thus, this legislation does nothing to prevent a birth father who can make the requisite showing from coming forward.

The 120 day limit for the placing parent's revocation of consent is laudable.<sup>277</sup> By making consent permanent within the first four months after placement, the legislation comports with the guidelines of attachment theory. In other words, removal of an infant at four months, while difficult or even devastating for the prospective adoptive parents, will not likely have a significant detrimental effect on the child's future development.<sup>278</sup> It also provides finality for adoptive

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271. See *supra* part II.C.

272. CAL. FAM. CODE § 8801.5 (West 1995) (operative Jan. 1, 1995).

273. See *supra* text accompanying notes 114-15.

274. Family Law—Adoption—Independent, ch. 758, 1993 Cal. Legis. Serv. No. 9, §§ 3426, 3431 (West) (addition of § 8801.5 to the Family Code).

275. CALIFORNIA COMMITTEE ANALYSIS, ASSEMBLY COMMITTEE ON JUDICIARY BILL No. S.B. 792, May 4, 1993 available in LEXIS, Cal Library, Cacom File.

276. *Id.* The analysis of Senate Bill 792 discusses the desire to give people sufficient information before they make the decision to give up their child. *Id.*

277. See *supra* part II.C.2.

278. See *supra* text accompanying notes 193-202.

parents. They know that on the 121st day the birth parent or parents who placed the child for adoption cannot ask for the child back.

However, this provision is far from perfect. While it provides finality for the prospective adoptive parents on the 121st day, it also treats them harshly if the placing birth parent(s) revokes consent during the four month period. Family Code section 8815(b) mandates immediate return of the child. Moreover, if the prospective adoptive parents have legitimate concerns regarding the fitness of the birth parent they have little recourse. They may report their concerns, but the child must still be returned.<sup>279</sup> This outcome could prove very dangerous to a child whose birth parent or parents are, in fact, unfit.

Thus, the legislation fails to provide adequate protections and safeguards to very young children who may need protection. Specifically, excluding the non-placing parent (usually the biological father) from counseling opens the door to potential custody battles. The 120 day limit treats prospective adoptive parents very harshly. It also affords no protection to the child if bona fide questions of parental fitness exist.

## V. PROPOSAL

### A. *Provide Counseling to Non-Placing Parent*

Advisement of rights and counseling should not be limited to the parent placing the child for adoption. The cases discussed above illustrate instances where the non-placing parent, the biological father, refused to consent to the adoption. Counseling would advise him of the appropriate legal action he needs to take. Counseling might also encourage him to think his decision through and may even change his mind about petitioning for custody of his child.

Accordingly, Family Code section 8801.5(a) should be amended to read:

(a) Each birth parent ~~placing a child for adoption~~ [from whom consent is required] shall be advised of his or her rights by an adoption service provider, or in the case of a birth parent who is neither a resident of, nor physically present in, this state, by a representative of an

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279. See *supra* part II.C.2.

agency licensed or authorized to accept consents to adoption in the state in which the birth parent resides or is physically present for a purpose unrelated to an adoption.<sup>280</sup>

This small change allows a birth father to be adequately informed, and may prevent him from revoking his consent.

B. *Develop Incentives for Birth Mother to Identify Birth Father*

A further provision to prevent birth fathers from appearing unexpectedly to thwart adoptions involves providing the proper incentives for birth mothers to accurately identify the birth father. Once identified, the proper consent and counseling actions can be more easily taken by the appropriate agency.

Every birth mother, regardless of the type of adoption, should be required to identify accurately the birth father if he is known to her. It is the legislature's function to design the proper and most effective form; the possibilities, however, range from criminal or civil sanctions to signing an affidavit under penalty of perjury after taking an oath. The importance and need for this information should be explained to her as part of her pre-placement advisement of rights and adoption procedures.

A birth mother may wish that the birth father remain unidentified, often with good reason. She should be required nonetheless to disclose his identity to a judge. The birth mother should be required to inform a judge *in camera* of her reasons, then if the judge deems them adequate, the identification requirement shall not apply in her case. Whether the biological father *remains* unidentified should be left to the judge's discretion. Potentially adequate reasons for a biological father to remain unidentified might include, but should not be limited to: incest, rape or history of violence toward the birth mother by the biological father.

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280. CAL. FAM. CODE § 8801.5(a) (West 1995). The change strikes out the reference to placing parent and includes the reference to parents from whom the statutes require consent.

C. *Amend Family Code Section 8815 to Safeguard Child*

Family Code section 8815(c) should be amended to include some means to protect a child from perceived harm. The statute should be changed to read as follows:

(c) If the person or persons with whom the child has been placed have concerns that the birth parent or parents requesting return of the child are unfit or present a danger of harm to the child, that person's or those person's ~~only option is to report their concerns to the investigating adoption agency and the appropriate child welfare agency. These concerns shall not be a basis for failure to immediately return the child.~~<sup>281</sup> [option is to request a hearing as to the fitness of the birth parents. The hearing shall be held within 15 days of the request for return of the child. Until the outcome of the hearing, the child shall remain with the person or persons with whom the child has been placed. If the outcome of the hearing finds the birth parent or parents fit or presenting no danger to the child, then the child shall be immediately returned.]

This change protects the interests of the child and the prospective adoptive parents. For the vast majority of birth parents fitness will not be an issue, and this action will not likely be taken. A safeguard is necessary, however, for those cases where the fitness of the birth parents can legitimately be questioned. Once questioned, parental fitness is an issue for the court to decide, not the agency or the Department of Social Services.

D. *Follow Michael H. Example in Protracted Cases*

*Guardianship of Michael H.* provides excellent precedent for protracted custody decisions.<sup>282</sup> Protecting the child should always be the paramount focus of juvenile law. Accordingly, in situations where the child has formed a primary attachment to the prospective adoptive parent and the parental rights of the birth parent petitioning for custody can be legally terminated, a two-part detriment/best interest analysis should be performed in order to decide the adoption question. If the parental rights of the birth parent petitioning for custody cannot be legally terminated, then a two-part detri-

281. *Id.* § 8815(c) (West 1995). The portion struck out will be removed. The wording in brackets is added to indicate the proposed change.

282. See *supra* part II.D.2.

ment/best interest analysis should be performed in order to decide the question of guardianship.

A proper detriment analysis will determine whether the award of custody to the birth parent will be detrimental to the child. In determining detriment, an assessment of the impact on the child's development by removing her from her only known home should be conducted. This analysis ensures that the child remains the true party in interest to the proceedings surrounding her custody.

A proper best interest analysis would follow the detriment analysis and rely on the discretion of the court. The test should be the same as that currently in Family Code section 8815(d) which reads:

Consideration of the child's best interests shall include, but is not limited to, an assessment of the child's age, the extent of bonding with the prospective adoptive parent or parents, the extent of bonding or potential to bond with the birth parents or parents, and the ability of the birth parent or parents to provide adequate and proper care and guidance to the child.<sup>283</sup>

#### E. *Need for Uniformity*

Critical to the success of adoption reform in any one state is nationwide uniformity in adoption laws. The California legislature should wholeheartedly support the redrafting of the Uniform Adoption Act in order to find it acceptable to the people of this state for ratification.

### VI. CONCLUSION

The tension among the varied level and competing rights of biological fathers, prospective adoptive parents, and the child can be resolved. Initial identification of the biological father decreases the likelihood of a protracted custody battle later. Once identified, he will be included in counseling sessions to be advised of his rights. Accordingly, any attempt to regain custody will begin prior to placement of the infant with prospective adoptive parents. Identification and resolution of the issue prior to placement greatly increases the likelihood of permanent placements in independent adoptions. In the unlikely event of a protracted battle for custody post-

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283. CAL. FAM. CODE § 8815(d) (West 1995).

placement, excellent precedent for deciding the case in favor of preventing undue harm to the child, as illustrated by the San Diego Superior Court decision *In the Guardianship of Michael H.*, should be followed.

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